

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of DAVID A. ATWELL and DEPARTMENT OF THE NAVY,  
MARINE CORPS DEVELOPMENT & EDUCATIONAL COMMAND,  
Quantico, VA

*Docket No. 02-1325; Submitted on the Record;  
Issued November 4, 2002*

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DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,  
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation on the basis that he refused an offer of suitable work.

On June 15, 1983 appellant, then a 30-year-old laborer, filed a claim for a traumatic injury sustained on June 14, 1983 when a rock flew from under a mower and struck him in the groin. The Office accepted that appellant sustained a hematoma of the right and left scrotum and a psychogenic pain disorder.

Appellant's employment was terminated on September 30, 1983 when his temporary appointment ended.

By letter dated October 20, 1998, the Office, which had been paying appellant compensation for temporary total disability since August 2, 1983, advised him that it needed yearly medical evidence to establish continued total disability and that the last medical evidence it had was from 1996. By letters dated June 20 and October 24, 2000, the Office again advised appellant of the need for current medical evidence of disability.

Appellant submitted reports from a hospital from September 29 to October 8, 2000 for substernal chest pain, which the treating physicians concluded was not cardiac in origin. He also submitted a September 22, 2000 note from Dr. Joseph D. Paquette, a Board-certified family practitioner, that listed, under objective findings, "chronic anxiety." In a report of appellant's work tolerance limitations dated November 29, 2000, Dr. Paquette indicated that he had a work-related medical problem, but that he could lift 50 pounds, sit or walk 8 hours, stand or bend 4 hours, reach above the shoulder 8 hours and use his hands for handling, manipulation and grasping 8 hours. Dr. Paquette indicated that, with all his restrictions, appellant could work eight hours a day.

On March 2, 2001 the employing establishment offered appellant a limited-duty position as a part-time custodial worker, with restrictions as set forth by Dr. Paquette. The employing establishment allotted appellant 10 days to respond.

By letter dated March 21, 2001, the Office advised appellant that it had found the position offered by the employing establishment to be suitable and allotted him 30 days to accept the offer or provide his explanation for refusing it.

Having received no reply and having confirmed that the offer was still available, the Office, by decision dated June 14, 2001, terminated appellant's compensation effective July 15, 2001 on the basis that he refused an offer of suitable work.

By letter dated August 30, 2001, appellant requested reconsideration and submitted a report dated June 25, 2001 from Dr. Paquette that stated:

"It has come to my attention that there have been some errors in recent paperwork generated from my office that erroneously implied that [appellant] is not 100 percent disabled. [He], of course, has been designated 100 percent disabled for I believe approximately 18 years and remains fully disabled from my estimation for the following reasons:

1. Status post scrotal injury.
2. Cervical spine stenosis.
3. Lumbar dis[c] disease.
4. Depression.

I am aware of no changes in his medical status that have improved his overall prognosis."

By decision dated November 27, 2001, the Office found that the additional evidence was insufficient to warrant modification of its prior decision. Regarding Dr. Paquette's June 25, 2001 report, the Office found:

"In this letter, Dr. Paquette implied but did not state explicitly, that his work restrictions of November 29, 2000 were in error and that you remained temporarily totally disabled. He stated that this was due to your differential diagnoses of 'status post-scrotal injury;' cervical spinal stenosis, lumbar disc disease and depression. While the first and last of these conditions are work related, cervico-lumbar disc disease and stenosis is not and your disability due to these conditions would not entitle you to compensation, although this office must take them into account in making a determination of suitability. While the other conditions remain accepted in this claim, Dr. Paquette provided no explanation in the June 25, 2001 letter how his work restrictions of November 29, 2000 were in error and how your medical conditions changed or worsened to cause a recurrence of disability for work."

The Board finds that the Office improperly terminated appellant's compensation on the basis that he refused an offer of suitable work.

Under section 8106(c)(2) of the Federal Employees' Compensation Act, the Office may terminate the compensation of an employee who refuses or neglects to work after suitable work is offered to, procured by or secured for the employee.<sup>1</sup> To justify termination of compensation, the Office must establish that the work offered was suitable.<sup>2</sup>

The Office accepted that appellant's June 14, 1983 employment injury resulted not only in a physical injury to his scrotum, but also in a psychogenic pain disorder. The Office's most recent referral physician, Dr. Thomas R. Lanyi, a Board-certified urologist, suggested in a July 8, 1994 report that appellant's problem was not organic but rather was psychosomatic in origin.

Dr. Paquette's November 27, 2000 work tolerance limitations addressed only appellant's physical limitations. This report, from a Board-certified family practitioner, does not indicate whether appellant's limitations, if any, from his accepted psychological condition would allow him to work. In addition, Dr. Paquette's November 29, 2000 report is directly contradicted by his June 25, 2001 report, which unequivocally states that appellant continues to be 100 percent disabled.<sup>3</sup>

Although the most recent report from a psychiatrist stated that appellant's employment injury "really aggravated [his] previous narcissism and sense of entitlement, but should have been temporary when further physical damage was no longer found," this report from Dr. Bruce E. Baker, a Board-certified psychiatrist, to whom the Office referred appellant for a second opinion, was dated January 14, 1986, over 15 years before the employing establishment offered appellant a limited-duty position. Its conclusion about the cessation of the injury-related aggravation of appellant's psychiatric condition is speculative and is contrary to the conclusion of appellant's treating psychiatrist, Dr. Karl H. Mueller, that appellant's depression and anxiety were caused in part by the chronic pain from his employment injury.

The Office has not established that appellant, in light of his employment-related impairments and his impairments not related to his employment,<sup>4</sup> was capable of performing the duties of the position offered by the employing establishment on March 2, 2001 and, therefore, has not established that the offered position was suitable.

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<sup>1</sup> 5 U.S.C. § 8106(c)(2) provides in pertinent part: "A partially disabled employee who ... refuses or neglects to work after suitable work is offered to, procured by, or secured for him; is not entitled to compensation."

<sup>2</sup> *David P. Camacho*, 40 ECAB 267 (1988).

<sup>3</sup> *See Patrick A. Santucci*, 40 ECAB 151 (1988).

<sup>4</sup> *See Edward J. Stabell*, 49 ECAB 566 (1998). ("All of appellant's impairments, whether work related or not, must be considered in assessing the suitability of the position.")

The November 23 and June 14, 2001 decisions of the Office of Workers' Compensation Programs are reversed.

Dated, Washington, DC  
November 4, 2002

Colleen Duffy Kiko  
Member

David S. Gerson  
Alternate Member

A. Peter Kanjorski  
Alternate Member